SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 109

CITY OF YONKERS AND JOHN W. TOOLEY, JR., AS PRESIDENT OF COMMITTEE OF YONKERS COMMUTERS, ETC.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND THE NEW YORK CENTRAL RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MEMORANDUM ON BEHALF OF APPELLANT, TOOLEY, IN OPPOSITION TO MOTION TO AFFIRM.

HORACE M. GRAY,
Counsel for Appellant, Tooley.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 109

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK (STATE DIVISION, DEPARTMENT OF PUBLIC SERVICE),

Plaintiff;

CITY OF YONKERS AND JOHN W. TOOLEY, JR., AS PRESIDENT OF COMMITTEE OF YONKERS COMMUTERS, A VOLUNTARY UNINCORPORATED ASSOCIATION COMPOSED OF MORE THAN SEVEN MEMBERS,

Appellants,

vs.

UNITED STATES OF AMERICA, THE NEW YORK CENTRAL RAILROAD COMPANY AND INTERSTATE COMMERCE COMMISSION,

Appellees.

MEMORANDUM ON BEHALF OF APPELLANT, TOOLEY, IN OPPOSITION TO MOTION TO AFFIRM.

On March 20, 1943, after a hearing held November 12, 1942, the Interstate Commerce Commission issued its certificate and order permitting The New York Central Railroad

Company, an appellee, to abandon 3.1 miles of an interurban electric railway 7.8 miles long for the reason that the operating costs at present exceed revenues.

The 3.1 mile section—called the Yonkers Branch—extends from Van Cortlandt Park Junction in New York City to Getty Square in Yonkers, New York. The balance of the electric line extends from Van Cortlandt Park Junction to Sedgwick Avenue, New York City, and parallels the Hudson Division of the New York Central Railroad south from University Heights.

The abandonment of the Yonkers Branch would also result in the discontinuance of all the electric service to Sedgwick Avenue.

The steam line of the Putnam Division of the N. Y. Central extends north from Van Cortlandt Park Junction to Brewster, New York. It runs steam trains over the electric line from Van Cortlandt Park Junction to Sedgwick Avenue.

The trains run on the electric line are made up of two to four light M. U. (multiple unit) cars "like trolley cars" operated on a third rail.

The electric cars cannot operate on the steam line north of Van Cortlandt Park Junction.

The steam trains cannot operate on the Yonkers Branch because the bridges are too light to bear a steam locomotive.

No freight of any kind is carried on the Yonkers Branch. Its business is solely passenger traffic, predominantly commuting.

The record shows no passenger tickets sold at the stations on the Yonkers Branch to any point outside New York State. All its traffic is between Yonkers and New York City, which cities are adjacent to each other.

The Yonkers Branch lies wholly within the State of New York and all its business is intrastate.

After the order of the I. C. C. was made these appellants filed timely motions for a rehearing and reargument upon the ground of newly discovered evidence and changed traffic conditions—which need not be detailed here—and claimed that under § 1 (22) of the Interstate Commerce Act (49 U. S. C.), the Interstate Commerce Commission is without jurisdiction of the subject matter.

In its decision upon which its order of March 20, 1943, was based, the I. C. C. had made no findings of fact that support it in assuming jurisdiction of the subject matter. It denied the petition for rehearing and still made no findings to support its jurisdiction.

This suit was then commenced under §§ 41-47, Title 28 U. S. C., to vacate the certificate and order upon the general grounds that:

1. The I. C. C. was without jurisdiction of the subject matter for two reasons—which will be discussed *post*.

2. The proceedings before the I. C. C. did not constitute due process and violated the Fifth Amendment to the Constitution.

The merits were tried to a Statutory Court on June 2, 1943, and it entered its order on June 10, 1943,—without the findings required by Rule 52, F. R. C. P.—sustaining the I. C. C. and holding that these appellants were not entitled to any hearing before the I. C. C., and, therefore, were not entitled to a rehearing.

These appellants, The City of Yonkers, and John W. Tooley, Jr., as President of a Committee of Yonkers Commuters, who had been parties in all the proceedings above described now appeal to this Court under 28 U. S. C. § 47 and pray a stay of the I. C. C. order pending the hearing and determination of the appeal. The matter of appeal by the State of New York is now before Governor Dewey.

Questions Presented.

Two important matters are involved in this appeal:

1. The conflict of jurisdiction between the I. C. C. and the Public Service Commission of the State of New York.

2. Violation of due process in the proceedings.

Conflict of Jurisdiction.

The Yonkers Branch presents a matter of purely local transportation and, *prima facie*, falls within the exclusive jurisdiction of the State P. S. C.

The P. S. C. is qualified to deal with it and is much more intimately familiar with local conditions and local problems than the I. C. C.

If the carrier feels itself aggrieved by the action of the P. S. C. it may have recourse to the courts of the State of New York and this Court may review by certiorari if so disposed.

No valid reason appears why such controversies should be thrown into the Federal Courts by reason of efforts of the I. C. C. to extend its jurisdiction beyond the plain language of the Act.

Interference by a federal agency with the internal affairs of a state are not encouraged by this Court.

This Court said in *Palmer* v. *Mass.*, 308 U. S. 79 at pages 84-5:

> "Therefore, in construing legislation this Court has disfavored in-roads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress. (cases)
>
> "The dependence of local communities on local railroad services has for decades placed control over their curtailment within the regulatory authorities of the State. Even when the Transportation Act of 1920, 49

U. S. C. A. § 1 (18-20), gave the Interstate Commerce Commission power to permit abandonment of local lines when the over-riding interests of interstate commerce required it, *Colorado v. U. S.*, 271 U. S. 153, this was not deemed to confer upon the Commission jurisdiction over curtailment of service and *partial discontinuances.*" (Italics supplied)

This Court said in *Florida* v. *U. S.*, 282 U. S. 194, at pages 211-12:

> "The propriety of the exercise of the authority must be tested by its relation to the purpose of the grant and with suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the *justification* of the exercise of the federal power *must clearly appear. Illinois C. R. Co. v. State Public Utilities Commission*, 245 U. S. 493." (Italics supplied)

The I. C. C. may not acquire jurisdiction of this interurban electric line unless it is

> "operated as a part or parts of a general steam railroad system of transportation" (§ 1 (22) 49 U. S. C.)

even though it had crossed state lines.

The I. C. C. has made no finding that this branch falls within that statutory category. The record would not support such a finding if it had been made.

The absence of that foundation is fatal to the validity of its order.

This question of jurisdiction is one of mixed fact and law and the determination of the I. C. C. is open to review by the Courts.

U. S. v. *Idaho*, 298 U. S. 105, 109.

The Statutory Court in its opinion referred vaguely to unenumerated "significant facts" upon which it based its

affirmance but made no finding adequate to form a basis for jurisdiction in the I. C. C. under § 1 (22).

No evidence was introduced before the Statutory Court on this feature that was not before the I. C. C.

There is no pronouncement by this Court that we have been able to find purporting to define what constitutes *operation* of an electric interurban line "as a part or parts of a general steam railroad system of transportation".

A definition of an interurban electric railway is to be found in the case of *Piedmont & Northern R. Co.* v. *I. C. C.*, 286 U. S. 299, at page 307. The Yonkers Branch falls squarely within that definition.

The Branch itself has no connection at all with the New York Central system but its passengers may transfer to the Hudson Division—as from a trolley car—at University Heights or Highbridge, but these points are *below* Van Cortlandt Park Junction. Or they may continue to the electric terminus at Sedgwick Avenue and there transfer to the shuttle connection with the New York City subway system.

"Operation" does not mean ownership but "would relate to methods of railroad transportation" (*Shields* v. *Utah Idaho Cent. R. Co.*, 305 U. S. 177, 180).

The New York Central System was complete before it acquired and absorbed the Yonkers Branch as a competing passenger service wholly separate and distinct from its own trackage and traffic (See Answer to Question 2*A* in N. Y. Central Answers to Questionnaire, attached to complaint as part of Exhibit A.)

The abandonment of the Yonkers Branch would have no physical effect upon the operation of the New York Central railroad system and could have no effect upon interstate commerce—with which the I. C. C. is alone concerned.

Assumption of jurisdiction in this case where the line does not "interchange standard freight equipment with

steam railways and participate in through interstate freight rates with such carriers" is totally at variance with the settled administrative interpretation referred to in *U. S. v. Chicago, North Shore & Milwaukee R. R. Co.*, 288 U. S. 1, at pages 12-14.

The I. C. C. in its report therein referred to suggested the inclusion of *all electric railways* into the category of interurban electric lines.

Unless the I. C. C. has jurisdiction under § 1 (22) the second jurisdictional question does not survive.

That question is whether the alleged annual operating deficit of some $56,000 constitutes an "undue" burden on interstate commerce.

The existence of an "undue" burden is a jurisdictional question upon which the I. C. C. passes. In the absence of "undue burdens or discrimination" (*Colorado v. U. S.*, 271 U. S. 153, at page 162) the jurisdiction over the matter rests with the State regulatory body, in this case the Public Service Commission of the State of New York.

In the case at bar the I. C. C. has found an estimated annual loss of $56,941 on the basis of the years 1940 and 1941 although the record shows that traffic is increasing and Division IV of the I. C. C. so found. The appellants asked an opportunity to show that this alleged loss can be materially reduced if not wholly eliminated but its petition was denied by the Commission.

The mere existence of an operating deficit is not enough (See *I. C. C. v. Oregon-Washington R. & Nav. Co.*, 288 U. S. 14 at page 37). The State authority cannot be ousted until the deficit amounts to an "undue" burden on interstate commerce. The carrier is now making a net profit after taxes of nearly $6,000,000 per month and its net revenue has been steadily increasing month by month for the past year.

This Court held in *New York & Queens Gas Co.* v. *McCall*, 245 U. S. 345 at page 351 that a public utility may not "pick and choose" to avoid unprofitable territory.

When the jurisdiction of the I. C. C.—which is a mixed question of fact and law—depends upon its own determination this Court should require that the record include a substantial factual basis in the form of evidence and findings of fact to support its determination of jurisdiction.

It is too much to expect a government bureau to curtail its field of endeavor by resolving doubts as to its jurisdiction against itself particularly if the basis of its decision may be shrouded in generalities.

Therefore the ultimate finding of an "undue" burden should be supported by findings of the facts upon which the conclusion is based. That is part of due process. Only thus may the people and the states be protected against otherwise uncontrolled, arbitrary and capricious exercise of power. The Tenth Amendment to the Constitution must mean something. Without some yardstick to measure the proper exercise of power by the Commission, the public and the railroads are at the mercy of some whim of temporary policy.

This Court said in the *Colorado* case at p. 166:

> "The authority to *find the facts* and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission". (Italics supplied)

There are no findings in this record of any facts indicating that the Yonkers Branch creates an "undue" burden on interstate commerce and no evidence in the record that it even creates a burden. All expert opinions proceed upon a factual foundation, and no exception seems called for in the case of an expert Commission.

Without any rein upon the Commission it might well use the magic words "undue burden" to muscle in on most of

the internal transportation affairs of every state in the Union and throw the litigation thereby engendered into the Federal courts where it does not belong.

Lack of Due Process.

The Statutory Court held on the strength of *Woodruff* v. *U. S.*, 40 Fed. Supp. 949, that these appellants were not entitled of right to any hearing before the I. C. C. and therefore their petitions for rehearing to show:

1. That the N. Y. Subway system would be extended after the war to Sedgwick Avenue and that the prosperous traffic conditions existing before the removal of the Sixth and Ninth Avenue Els would thus be restored;

2. That Yonkers city taxes on the right-of-way would be substantially reduced with consequent saving to the carrier;

3. That taxes paid the City of New York on the right-of-way in Van Cortlandt Park could reasonably be reduced

were properly rejected.

The law under the Fifth Amendment requires a hearing before the rights of any individual may be injuriously affected (See *Shields* v. *Utah Idaho Cent. R. Co.*, 305 U. S. 177, 182).

Section 1 (19) of the Interstate Commerce Act provides for rules and regulations for "hearings" and for advertisement of the proceeding. Congress certainly contemplated hearings by the I. C. C. Congress itself is subject to the Constitution. Its creature, the I. C. C. cannot exercise powers and prerogatives denied its creator.

Appellants also claim that the communication with the War Department by the I. C. C. as to the former's need for scrap steel after the subject had been excluded at the hearing—and in the absence of the parties in interest—is a gross violation of the due process clause.

Similarly the acceptance by the Commission of a letter from Mr. Moses raising an issue as to the subway extension without notice to the parties and in violation of the Commissions's Rule 22 requiring notice constitutes another grave violation of due process. The issue so raised was summarily decided against the appellants without a hearing by the denial of a rehearing.

The Stay.

Irreparable injury would result to the appellants if the carrier were at liberty to tear up its tracks while this appeal is under consideration.

The loss of time and money and the heavy inconvenience that would be suffered by the commuters on the line—between 600 and 800—greatly outweigh any loss the carrier might suffer in the interim.

The doctrine of comparative injury recognized in

Prendergast v. *N. Y. Telephone Co.*, 262 U. S. 43, 51 and *Allison* v. *Corson*, (CCA 8) 88 Fed. 581, 584

we think is applicable here.

Conclusion.

The motion for affirmance should be denied and the stay *pendente lite* requested should be granted.

Respectfully submitted,

Horace M. Gray,
Attorney for Appellant, Tooley.